

Hogan Transports, Inc. and James S. Powell Jr.
Case 14-CA-25382

June 9, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND BRAME

On January 3, 2000, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Hogan Transports, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, offer James S. Powell Jr. full-time employment as an over-the-road truckdriver at its St. Louis, Missouri terminal or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled absent the discrimination against him."

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We affirm the judge's finding that the General Counsel met his initial evidentiary burden under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), with respect to the Respondent's refusal to hire applicant James Powell Jr. Specifically, we find that the record establishes that the Respondent was hiring at the time that Powell applied for employment; that Powell had experience and training relevant to the announced or generally known requirements of the position for hire (over-the-road truckdriver); and that antiunion animus contributed to the Respondent's decision not to hire him. See *FES*, 331 NLRB No. 20, slip op. at 4 (2000). We also agree with the judge, for the reasons stated by him, that the Respondent failed to satisfy its *Wright Line* burden of showing that it would not have hired Powell even in the absence of his union activity.

Additionally, the judge in his decision erroneously stated that Recruiting Manager Arthur Lopinot interviewed Powell on October 28 or 29, 1998. Powell was interviewed on September 28, 1998. We corrected the inadvertent error.

² We shall modify the judge's recommended Order to add an expunction remedy and to conform to *Indian Hills Care Center*, 321 NLRB 144 (1996). Further, no exceptions have been filed to par. 2(b) of the judge's recommended Order.

2. Insert the following as paragraphs 2(b) and (c), and reletter the subsequent paragraphs.

"(b) Make James S. Powell Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire James S. Powell Jr., and within 3 days thereafter notify the employee in writing that this has been done and that the unlawful refusal to hire will not be used against him in any way."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to hire James S. Powell Jr. because of past membership in, support of, or activities on behalf of the Teamsters Union.

WE WILL NOT instruct job applicants to abandon their sympathies, support, or activities on behalf of the Teamsters Union as a condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer James S. Powell Jr. full-time employment as an over-the-road truckdriver at our St. Louis, Missouri terminal or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which he would have been entitled absent the discrimination against him.

WE WILL make James S. Powell Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire James S. Powell Jr., and WE WILL, within 3 days thereafter, notify him in writing that this

has been done and that the refusal to hire will not be used against him in any way.

HOGAN TRANSPORTS, INC.

Christal J. Cuin, Esq., for the General Counsel.

Mark W. Weisman, Esq., of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The trial of this matter was held before me on June 9 and 10, 1999, in St. Louis, Missouri. The unfair labor practice charge was filed on December 7, 1998, by James Sr. Powell Jr., an individual, against Hogan Transports, Inc. (the Respondent). On March 30, 1999, after an investigation, the Regional Director issued a complaint against the Respondent which alleged that on about September 1998, the Respondent failed and refused to hire Powell because of his prior union membership and concerted activities engaged in at another place of employment.

The Respondent filed an answer which denied the commission of any unfair labor practice. The issue litigated before me was whether Powell was refused employment by the Respondent because of his membership in and activities on behalf of the Teamsters Union as a steward while employed at United Parcel Service (UPS) and while subsequently employed by the Teamsters International as a business representative directly appointed by the Teamsters International union president. The Respondent denied that motivation and asserted that despite its urgent and pressing needs for over-the-road drivers and despite Powell's significant, unflawed, and prebusiness representative appointment driving experience with UPS, Powell was refused employment for two reasons. The first reason was that unlike UPS tractor-trailer over-the-road driving, which was geographically limited and did not require overnight absence from home, the Respondent's deliveries involved interstate travel, which at best permitted a return home on the weekend, and it was presumed but never asked of Powell that he would be unhappy in such away-from-home work and, thus, an "unsuitable" candidate. Powell's work as an International Union business representative necessitated similar lengthy week-long absences from his home. The second reason proffered for Powell's nonhiring was that it was also presumed, but not discussed with him, that he would be demoralized by the severe reduction in his income as an appointed International Union business agent from about \$62,000 per year to about \$18,000 to \$25,000 normally paid to driver hirees, depending on their experience. Although Powell's admittedly excellent and lengthy driving experience with UPS involving identical type 18-wheeler rigs was interrupted by his 7-year work as a union business agent, the absence was not proffered as a major nonhiring reason, it was taken into consideration; the Respondent presumed that Powell might need retraining at the Respondent's expense and, thus, the Respondent allegedly concluded that the above factors did not justify the risk of hiring an unsuitable candidate likely to quit, although the Respondent already experienced a 100-percent turnover rate in the first year of a hiree's employment.

At the trial, the parties were given full opportunity to adduce relevant testimonial evidence as well as documentary evidence. The parties were also afforded the opportunity to submit posttrial briefs, which were received on August 16, 1999.

The briefs submitted by the parties fully delineate the facts and issues and, in form, approximate proposed findings of facts and

conclusions. Portions of those briefs have been incorporated herein, sometimes modified, particularly as to undisputed factual narration. However, all factual findings are based on my independent evaluation of the record. Based on the entire record, the briefs, and my observation and evaluation of the witnesses' demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all material times, the Respondent, a Missouri corporation with its principal office and place of business located in Bridgeton, Missouri (the Respondent's facility), has been engaged in the interstate transportation of freight. During the calendar year ending December 31, 1998, in conducting this business operation, the Respondent derived gross revenues in excess of \$50,000 for the transportation of freight from the State of Missouri directly to points outside Missouri.

It is admitted, and I find, that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that at all material times, International Brotherhood of Teamsters, AFL-CIO (the Union), has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

The Respondent, a Missouri corporation with its principal office and place of business located in Bridgeton, Missouri, operates an interstate trucking company employing about 400 over-the-road drivers out of its St. Louis terminal who operate 18-wheeler tractor-trailers. The Respondent also employs drivers at its Columbus, Ohio and Fontana, California facilities. The Respondent hauls a variety of commodities, including air-conditioners, shoes, and pharmaceuticals. None of the Respondent's employees are represented by a labor organization. Thomas Lansing is the head of the Respondent's personnel department. Arthur Lopinot is a recruiting manager for the Respondent and reports directly to Lansing.

According to the testimony of Lopinot, life as an over-the-road truckdriver is difficult and the Respondent has learned that most who accept work as drivers find the work unsuitable. Normally, a driver for the Respondent is dispatched for periods of 7 to 10 days to designations throughout the contiguous 48 States and lower Canada on 2500 miles itineraries, returning home only briefly before being sent out again. New drivers earn annual salaries of only between \$18,000 and \$25,000, according to their prior experience.

Drivers normally work alone and have little contact with each other. There is no direct truck-to-truck means of communication (e.g., radio, telephone). The Respondent does not convene meetings. However, 80 percent of the Respondent's freight is dispatched on Sunday. All but a few drivers, who take their driving rigs home and who are dispatched on Sunday, report to the terminal where they have some opportunity for limited interaction.

Working alone, separated from family and friends for long periods, and earning fairly low wages, the majority of drivers soon quit. Terminations in the first year of employment for the Respondent are nearly 100 percent. The vast preponderance are voluntary resignations.

According to Lopinot, high turnover among drivers poses a number of problems for the Respondent. A turnover rate such as that experienced by the Respondent is inherently inefficient. New, inexperienced drivers are unfamiliar with routes, travel times, and designations. Wear and tear on tractors and trailers is greater when a driver is only rudimentarily familiar with a large rig's operation. Furthermore, in their first few months of service, drivers experience a disproportionate number of accidents. Finally, the cost of recruiting and training drivers to replace those who voluntarily terminate their employment with the Respondent is substantial. The Respondent employs two full-time recruiters in addition to Recruiter Manager Lopinot.

During the past few years, the Respondent has not been able to hire enough qualified drivers to fill all its driving positions.¹ This lack of drivers has forced the Respondent to have to pay Midwest Training Center (MTC) to recruit, hire, and train unskilled drivers. Even using MTC, the Respondent is unable to fill all of its driving positions most weeks. In addition to paying MTC to recruit and train employees, the Respondent has been forced to advertise on television and in the newspaper to attract applicants. The script of the television advertisement run to attract drivers for the Respondent states that applicants do not need any experience and the Respondent will pay for their training. The script concludes by saying "so, if you're ready to get off the couch—and on the road to a great career, then call Hogan now." Finally, the Respondent sponsors semiweekly seminars attended by those individuals responding to its various advertisements. The Respondent can incur over \$4200 in tuition costs to train new drivers, depending on the new driver's level of driving experience. Lopinot testified that trainees receive a maximum of 6 weeks' driving training and schooling but if they exhibited a good performance, the amount of training will be reduced. He admitted that it was uncommon for an experienced driver to require 6 weeks' training and that it was very rare to send to training school applicants such as Powell, an experienced driver who possessed a class A commercial driver's license (CDL).

Accordingly, Lopinot testified that when hiring drivers, the Respondent looks for employees with a stable work history who have stayed at prior jobs for long periods of time and it prefers to hire drivers with prior driving experience. The Respondent has found that hiring drivers without prior driving experience can lead to turnover, and it prefers applicants with no prior accidents, no alcohol related driving convictions, and no criminal convictions. The Respondent prefers to hire drivers who already have their CDL.

Lopinot testified that the Respondent seeks to recruit individuals who appear to be good prospects for long-term employment and applicants with previous over-the-road experience who appreciate the difficulties of the work. He testified that he has hired individuals whose wage histories indicate that accepting employment with the Respondent would be a step up, those looking to make a fresh start, and those with family members already working for the Respondent. Lopinot testified that those who would be taking significant reductions in pay by accepting employment with the Respondent are presumed by him to be less likely to find the working conditions acceptable and, hence, are less likely to remain in the Respondent's employ.

Despite Lopinot's expressed references to the undisputed record evidence that during 1998 and 1999, the Respondent has

hired a multitude of drivers who held jobs which paid far in excess of the wage the Respondent pays its drivers, had no driving experience, had moved from job to job during a short period of time, had their driving privileges suspended, and had criminal records. Lopinot was admittedly involved directly or indirectly in the hiring decision of many of those persons.

Lopinot was involved in the hiring of inexperienced employees with diverse backgrounds, including mine workers, a convenience store employee, an aviation fueling supervisor, a petroleum pipeline employee, a retired U.S. army colonel, a cook, and a "decorator."

2. Powell's application

a. Background

Upon graduation from high school, Powell was hired by UPS. After an initial period of dock work, he transferred to driver work in 1978. He was a driver at UPS for 14 years, of which 6 or 7 years involved the operation of tractor-trailer units, i.e., "semi's" or 18-wheelers. Those tractor-trailers were the same type which were utilized by the Respondent. In fact, on occasion UPS temporarily rented the Respondent's tractor-trailers for use by UPS employees. At UPS, under U.S. Department of Transportation guidelines, Powell received intensive training in the operation of the tractor-trailers. He obtained and maintained to the date of the trial a class A CDL. He made deliveries of packages for UPS driving the tractors-trailers to cities within a 50-mile radius of the St. Louis area where he maintained his residence.

Powell drove 10 hours but was able to return home each night. Powell had no criminal record, accident recording, and no record of serious traffic violations.

During his employment as a UPS driver, Powell was a member of Teamsters Local 38 and held the position of shop steward from 1981 to 1992. He was also elected to the position of chief shop steward, and he participated in contract negotiations and grievance resolution meetings. His immediate supervisor was Mark Lawless in the UPS tractor-trailer division for 6 to 7 years.

As a steward, Powell became involved in one particular controversial grievance regarding the alleged denial by UPS of its drivers to wear union insignia buttons on duty. Powell had openly encouraged the drivers to wear those buttons and was the chief distributor. The division manager ordered all the managers to effectuate the order at the timeclock.

Powell testified, without categorical contradiction, that Lawless was one of those managers stationed at the timeclock to effectuate the order. Powell testified that he appeared at the timeclock and was summoned to the division manager's office where he was ordered to remove his Teamster's button or be discharged. Thomas Lansing was also employed by UPS as a manager during Powell's employment there. Powell conceded that Lawless and he manifested mutual respect toward one and another. Powell did not relate Lansing to the union button grievance. Lansing and Lawless and other UPS managers were subsequently employed by Respondent as managers and/or supervisors and were so employed when Powell subsequently applied for a driver's job there. Lawless testified that at the Respondent he is employed since October 1995 as the contractor division manager and has supervision of 120 drivers. He testified that at UPS he was a supervisor in the feeder department and functioned as a dispatcher and had no authority to hire or fire. He testified that his only function regarding grievances was to provide the assistance of a shop steward to a grievant and he did not participate in grievance resolution. He testified that he knew Powell but had no personal interaction

¹ From January 1, 1999, to the trial date, the Respondent has processed over 1340 job applications and had several hundred pending.

with him. He did not deny awareness of Powell's involvement in the button grievance, the subsequent order to remove those buttons, and his participation in its effectuation.

Lansing, the Respondent's personnel director, did not testify.

In 1992, Powell ceased work at UPS and was employed by the Teamsters International Union on direct appointment by its then president, Ron Carey, as an International Union business representative. As such, his duties involved union organizing, trustee work, and he gave assistance to local unions. His work performance required him to accept assignments to far-flung cities in such States as Michigan, Minnesota, Ohio, Georgia, and California, which permitted him to return home to St. Louis only 4 to 6 calendar days a month.

Carey was temporarily succeeded by his internal union ally, Thomas Sever, who was characterized by Powell as part of Carey's administration. With the onset of a U.S. Government supervised union election and rerun election and the pendency of its results, which indicated the installation of a new International Union president and administration, Powell concluded that his days as International Union business representative were limited. He was aware that Carey, on his own election, pursuant to custom, had discharged all of the prior administration's appointees. From internal union communications, he expected to be discharged on the verification of the election of the anti-Carey/Sever administration candidate. Powell informed his union superior that he would commence a search for a new job and to expect receipt of reference inquiries. Powell decided to return to the craft from which he originated—truck driving.

b. The interview

On about October 28 or 29, 1998, Powell was interviewed for employment at the Respondent by Lopinot and also engaged in a brief conversation with his former UPS supervisor, Mark Lawless, now employed by the Respondent. I find Powell the more credible witness, and I discredit the testimony of Lopinot and Lawless wherever its conflicts with that of Powell. Lopinot and Lawless were employed by the Respondent at the time of trial in managerial capacities and were thus disposed to favor their employees' interests. Powell had no past interaction with the Respondent and no past bias. He was hired as a driver for another trucking company on January 16, 1999, at an hourly rate of \$13.07 per hour and remained employed there at the date of trial with expectation of continued employment. Thus, his financial interest, at least, in the remedial order was not so overwhelming as it might otherwise have been. Of course, it was not relevant to this proceeding whether or not he abandoned his desire to be employed by the Respondent in a position which the Respondent assumes would be less desirable than that which he enjoys at his present employer, i.e., delivery work which allowed a return home each day, unlike the Respondent's driving duties.

However, there are vastly more important reasons why I discredit Lopinot and Lawless. Lopinot's testimony was inconsistent with the testimony of and documents concerning a neutral witness who had applied for work at the Respondent's facility. Lopinot testified the Respondent did not hire Kim Zellers because of her prior high wage history. Zellers, a disinterested witness, testified that after Lopinot reviewed her application which stated she was currently earning \$55,000, he told her that he was interested in hiring her as a driver and that he had a driving position available for her. Moreover, Lopinot testified that after he reviewed Zellers' application, he wrote "okay" on the application. He explained that the purpose of this marking was to indicate to MTC's

recruiter to schedule training for the applicant because the Respondent intended to hire the employee contingent on the applicant having an acceptable physical, drug test, motor vehicle report, criminal history report, and a verifiable work history. Zellers testified that it was she, rather than Lopinot, who had concerns about her driving over the road for the Respondent because she was a single parent of a 13-year old and preferred a management job. Lopinot claimed that the reason he refused to hire Zellers was because of her wage history. However, his own note contradicts this. The notes states: "UPS—looking to get out—This person really wants local *not* OTR/has 13 year old son. [No.]" Furthermore, a second note regarding Zellers' application dated August 27 (the day after Zellers filled out her application) states: "Talked to Larry Holt—wants to really work local—unsure of OTR," signed WCB to Art. Thus, consistent with Zellers' testimony, Lopinot's note reveals that Zellers was not hired because it was she who did not want an over-the-road job.

Zellers was only interested in driving duties as a stepping stone to a managerial position such as she possessed at UPS at the time of interview, but which she feared was in jeopardy in the face of an ongoing downsizing at UPS. She had started as a driver at UPS but had worked her way up to a manager's position that paid \$55,000 per annum at the time of her interview with Lopinot and which was reflected on her job application reviewed by Lopinot. Lopinot testified that he rejected Zellers' application because of her prior higher earning history and that the Respondent's driver job, which he told her would promise no upward mobility, offered \$18,000 to \$25,000 per year. According to Zellers' more credible testimony she was offered the driver's job by Lopinot and he asked if she could start by Monday, August 30, 1998. She deferred an answer and was pressed by three subsequent telephone calls from the Respondent soliciting her acceptance before she finally rejected the offer.

Lopinot's testimony on key issues in the case proved untruthful. When Lopinot was asked why, unlike he claimed he did with other applicants, he failed to discuss with Powell whether a wage cut would be a problem for him, Lopinot dissembled. Lopinot answered this crucial question put to him by the court by stating that he simply did not have time to talk with Powell as he had with other applicants, such as those he interviews at MTC seminars. However, after persistent subsequent questioning by the General Counsel, Lopinot was forced to admit that at an average MTC seminar, he spends between 3 and 4.8 minutes with each applicant.² Lopinot then recanted his testimony and admitted that he spent more time, 15 to 20 minutes, with Powell.

Lopinot was also evasive when asked important questions. For example, the General Counsel asked Lopinot for his assessment of Powell's qualifications as a driver. Lopinot repeatedly refused to provide a straightforward answer. Only after the General Counsel had asked the question six times did Lopinot finally answer that it was his assessment that Powell was well qualified for a position as a driver and had good experience.

Lopinot had a very poor recollection of the events surrounding the Respondent's decision not to hire Powell. For example, Lopinot could not recall whether he met with Powell on one or two occasions. Nor could Lopinot recall whether or not he gave Powell an application. He also could not recall with any certainty if he

² Lopinot stated that at an average seminar, he interviews between about 25 and 30 applicants in 1-1/2 to 2 hours. Assuming he interviews 25 applicants in 2 hours would be 4.8 minutes per applicant. Assuming the maximum of 30 applicants in 1-1/2 hours would be 3 minutes per interview.

discussed with Powell how much he could expect to earn while working for the Respondent or whether it would be a problem for Powell to take a wage cut. However, when it came time to explain why, the Respondent had hired other employees with high wage histories, Lopinot had a very vivid and detailed recollection of conversations with those applicants and the circumstances surrounding their hire.

With respect to the substance of what was said during the meeting with Powell, Lopinot was conclusionary, cryptic, selective, and extremely generalized with respect to any discussion of a pay cut. At best, Lopinot thought that he made "mention of it" but that he "didn't go into a lot of detail" as he had done so in-depth with similarly situated candidates who faced imminent or probable loss of higher paying jobs, some of which were managerial, because of downsizing or as with Powell, upper management pressure. When asked by the court why he did not do so with Powell, he answered merely that he did not remember the reason he did not. Certainly, he had more time to do so by his own admission. When pressed again for some explanation for the disparity of treatment and the suggestion put to him that he did not discuss the pay cut issue at all with Powell, Lopinot characterized his reference to a pay cut as "chatting, and information." When asked again whether he raised the issue of a pay cut with Powell at all, Lopinot answered:

Not really. Not going into a lot of details.

He was asked the same question twice more, and he answered twice.

I don't know.

Yet, Lopinot testified that it is his practice to "go one on one" with job applicants to explain to them in-depth the adverse aspects of Hogan employment to avoid a high turnover.

I found Lopinot to be an evasive, unconvincing witness. His demeanor was marked by a hesitancy and uncertainty in answering critical questions. His inability to explain his answers was accompanied by a flustered perplexity. The Respondent characterizes Lopinot as too "guileless" to dissemble. I agree that Lopinot was indeed without guile but that his lack of guile is what made his dissembling so transparent. Powell's testimony was detached, detailed, straightforward, spontaneous, and rendered in a rock steady, convincing demeanor.

Lawless was a far better witness than Lopinot with respect to demeanor. His direct examination, however, was silent as to whether or not he and Powell discussed the probabilities of Powell's hiring by the Respondent and what he had to do to get hired. In cross-examination, for the first time he denied having made reference to hiring probabilities, but he now conceded that he did make reference to Hogan's hiring procedures. When pressed further as to whether he told Powell that a well qualified driver would be hired by the Respondent if that person had the desire to work, Lawless could not recall and admitted that he may possibly have stated this to Powell. Lawless again could not recall other critical aspects of Powell's testimony regarding the removal of Teamster union stickers on Powell's vehicle, i.e., whether he suggested seriously or jokingly that Powell should remove those stickers if he expected to be hired. Because of his selective recollection and lack of recollective ability in those critical areas, I credit the far more certain and vividly narrated recollection of Powell.

On September 28, 1998, Powell drove his vehicle to the Respondent's terminal and parked in the parking lot. He obtained clearance from the guard and was met in the lobby by Lopinot

who occasionally interviews drop-in driver applicants. Powell immediately informed Lopinot that he was still employed as a Teamster business representative. Powell testified that he told Lopinot that he had accepted the Teamster position because of a reform movement that he considered to be in a "flat spin" and that he was ready to put the Teamsters Union "behind me and move on." He told Lopinot that he was unhappy with the new Teamster leadership and, in any event, he expected to lose his present job under the new union leadership and that he desired to return to truck driving.

Powell admitted that he could not recall whether he described to Lopinot the extent of his absence from home necessitated by his Teamster duties. He did not think the subject arose but was not certain. During his evasive testimony regarding the lack of in-depth discussions, or indeed any discussion with Powell about the cut in pay, Lopinot inadvertently admitted that he was aware that Powell was a "travelling representative" of the Union. Lopinot either obtained this information from other UPS managers whom he denied consulting or from Powell himself in the interview.³ It is undisputed that after Powell described his driving experience at UPS, Lopinot did refer to the wide interstate area of delivery which was involved in the Respondent's delivery work but emphasized that Powell would be able to return home each weekend.

In neither version of the conversation was there any discussion of the adverse impact of such driver isolation on the driver's morale nor that it might render Powell unsuitable in any way, and nor was there any reference to any kind of concern about it expressed by Powell. There was also no reference to whether Powell was even married at this point in the discussion, and also there was no reference to the extent of any other familial relationship in St. Louis.⁴

During the September 28 interview which lasted about 30 minutes, according to Powell's more credible testimony, Powell described his UPS driving experience to which Lopinot enthusiastically expostulated "great" and told Powell that UPS had a good training program and had provided Powell with good driving experience. Lopinot told Powell that an experienced driver hiree would start with the Respondent at 27 cents a mile. Although Powell could not recall whether Lopinot told him precisely what he might expect to earn during the first year, the 27-cent figure was sufficient to put Powell on notice of approximate earnings based on his own experience, the interstate nature of work explained to him, and the expectation that he would be on the road except for weekends. Neither version made any specific reference to the prospective cut in pay as a hiring impediment nor any reference that Powell had expressed any concern about it.

Lopinot told Powell several times during the initial interview that he was delighted to hire a mature, experienced driver because of the Respondent's high driver turnover of young, inexperienced, immature hirees. Lopinot further described in detail to Powell the Respondent's work benefits program, including the health care particulars and the pension and retirement benefits. Lopinot then told Powell that because of his experience, he would need minimal training and if he demonstrated his ability, he would soon be put on the road.

³ If Powell had referred to it, it more likely would have been in the context of Lopinot's description of the interstate nature of the Respondent's work and would have been a reassurance by Powell that such travel was not new to him.

⁴ In fact, Powell was married and his wife resided with him at their St. Louis home. It is not clear that Powell mentioned her in the interview.

Finally, Lopinot asked Powell if he were interested in the job. Powell said that he was and he was given an application form and an information packet. Lopinot told Powell that he could return the application by U.S. mail and that Lopinot would initiate the hiring procedure as soon as he received it because there was a need for "urgency." Powell asked when he might expect to be hired. Lopinot responded that he needed drivers "now" and asked about notice of resignation to the Teamsters. Powell responded that because of nature of his few remaining assignments, he could start quickly. Powell departed the lobby with his application.

As Powell was about to drive away in his vehicle—a pickup truck with attached camper—he saw Mark Lawless walking toward him in the terminal parking lot. It is undisputed that Lawless immediately recognized him, approached, and initiated a conversation in which Powell made reference to driver work at the Respondent and in which Lawless made reference to the numerous union stickers plastered over the camper shell. According to the testimony of Powell, whom I credit, the following conversation occurred. Powell told him about his impending loss of his Teamster's position and his application for a driver's job and asked Lawless how badly the Respondent needed drivers. Lawless responded "real bad" and stated that the Respondent was unable to keep the drivers it had hired. Powell asked how hard it would be for him to get a driver's job with the Respondent and was told by Lawless to "just show up." Then Lawless laughed and stated "you better get rid of those" and pointed to the Teamster's union stickers. Powell drove away.

Powell returned to the Respondent's terminal facility the next day and, contrary to Lopinot's testimony, again encountered Lopinot. According to the testimony of Powell, which I have credited, Powell returned to the lobby with a written application in hand and an employment verification letter from UPS which referenced his good driving record and driving time there. In the terminal lobby, Lopinot again greeted him and accepted the documents. Lopinot answered some minor questions regarding employment benefits put to him by Powell. Then Lopinot asked him if he recognized any of the persons who were standing in a nearby doorway. Powell identified Lansing to Lopinot as one of his former supervisors but could not identify the others whom Lopinot identified to Powell as unnamed former UPS supervisors. As Powell departed, Lopinot told Powell that he would telephone him. Powell then departed St. Louis for an overnight union assignment. Lopinot admitted that Powell told him that he would be away from home for a few days on business.

Powell returned from his business trip to receive a cryptic message left with his wife at his home by Lopinot to the effect that Lopinot could not help him out. On the weekend after that telephone call on October 11, Powell read an advertisement placed in a newspaper by the Respondent that solicited driver applications. Powell then telephoned Lopinot and told him to allow him to speak for a minute. Lopinot stated that he was busy processing new driver applicants. Powell asked why he had not been hired. Lopinot merely responded, "sorry, I can't help you out." Powell retorted that the only reason he was not being hired by the Respondent was his past union activities and threatened to proceed with some legal action. Powell protested to Lopinot, "It's not right." Instead of denying the accusation, Lopinot then told Powell, "Let me do a little checking and get back to you." Powell asked, "You're going to call me?" Lopinot stated that he would. Powell received no further contact from Lopinot.

c. The Respondent's proffered motivation

Contrary to Powell's credited testimony, Lopinot testified that he had only one meeting with Powell and that he made his decision as he was walking away from the interview site with Powell's application in hand and thereafter notified Powell's wife by telephone a few days later. Although Lopinot admitted that Powell identified Lawless and Lansing as his former UPS supervisors, he testified that he did not consult with them about Powell's application. Contrary to Lopinot's testimony, documentary and undisputed testimony reveal that Lopinot has on occasion consulted not only Lansing but also Lawless with respect to some driver applicants. The offices of Lansing and Lawless were admittedly only seconds away from Lopinot's office. Under Lopinot's version of the interview, it is difficult to believe that some input was not sought by him unless he had already made the decision to hire Powell. Under the credited factual situation, I find Lopinot's and Lawless' denial of consultation to be incredible. In the first interview, Lopinot enthusiastically welcomed Powell's employment and spent virtually no time discussing the pay cut issue and any adverse impact of overnight travel on Powell's family situation. However, when Powell appeared with application in hand in response to Lopinot's desire for urgency and a quick reporting date, Lopinot's enthusiasm wilted and the only issue he initiated with Powell was Powell's awareness of the Respondent's employment of Powell's former UPS supervisors and managers who just happened to be standing nearby. The facts raise a very strong inference that something happened between the two meetings and that the "something" was intervention by other management.

Initially, Lopinot evasively attempted to minimize the value of Powell's prior driving experience and attempted to make groundless assumptions that Powell might need the kind of training and schooling required of inexperienced drivers, presumably like the decorator and cook who were hired as drivers. His own inconsistent testimony refutes that suggestion, as do his assurances to Powell in the initial interview.

Lopinot explained that the two "major" reasons for his nonhiring of Powell were the interstate overnight nature of the Respondent's delivery work and the reduction in pay from that of a Teamster's business agent. Again, Lopinot's assurances to Powell in the interview and his own testimonial admissions as to the lack of indepth discussion on these issues, which are contrary to his admitted practice, undermine the veracity of his testimonial defense. Lopinot could give no coherent, compelling testimonial explanation as to just why he could not take a "chance" on the hiring of Powell when he admittedly had done so in the hiring of similarly situated candidates, given Powell's admittedly good driving experience, his good work history, his maturity, the huge turnover of drivers, and the almost desperate need for driver applicants.

Powell had informed Lopinot that he was washed up in the internal union political world and was about to be fired by the incoming administration. Lopinot knew Powell was a traveling union representative. He knew Powell would even be out of town overnight on assignment the coming week. Yet, Lopinot testified that he was unaware of the nature of duties of a union business agent and the unlikelihood of Powell obtaining another union representative equivalent job at equivalent pay. I find his testimony on this point completely disingenuous, i.e., that Powell as a Respondent driver would be demoralized and unhappy and, thus, unlikely to keep his low paying driver's job. Where else Lopinot expected Powell to seek employment at the higher pay and not travel overnight was not suggested in his testimony. Clearly, in

the interview, Lopinot was desperate for a driver, Powell was desperate to get out of union politics and get a driver's job, and neither a pay reduction nor overnight travel was raised as issues.

The Respondent suggests that the General Counsel has adduced statistically insignificant evidence that Powell was treated disparately, i.e., a few dozen incidents among thousands of applicants do not establish a pattern of conduct. However, the issue, as I see it, is Lopinot's credibility as the decision-maker. The General Counsel has adduced evidence of Lopinot's and other Respondent hiring agents' behavior with respect to numerous applicants similarly situated or less qualified or less experienced who were hired. Lopinot's testimony as to why he, as I find the facts, reversed his expressed promise overnight to hire Powell, is undermined by the evidence of disparity as well as other evidence. With respect to evidence as to similarity of treatment by Lopinot regarding the pay reduction impediment, the Respondent adduced evidence of not hundreds and not dozens of situations but two incidents. One was that of Zellers discussed above, which in fact contradicted the Respondent's position. With respect to the other applicant, a Mr. Keck, both Lopinot and Keck discussed the issue in depth, and Keck explicitly stated that the pay reduction was a problem. Lopinot admitted that the decision that the reduction in pay was an impediment to employment was a mutual agreement. Lopinot cited the Zellers and Keck hirings as "mere examples" of situations where reduction in pay precluded hiring of an applicant. As one of the incidents clearly contradicted Lopinot and the other was clearly distinguishable, I reject his testimony as to the existence of an unspecified number of applicant rejections premised on pay by Lopinot. If the Zellers situation is an "example" of Lopinot's practice, it clearly supports the General Counsel's argument of disparity of treatment.

B. Analysis

1. The Lawless remark

With respect to the 8(a)(1) allegation of the complaint, I find that the Respondent violated Section 8(a) of the Act when its manager, Mark Lawless, told job applicant Powell on September 29, 1998, that he had better get rid of the union stickers on his vehicle if he applied for a job with the Respondent, thus impliedly conditioning employment on abandonment of union activity and support. Compare *Electric Group*, 327 NLRB 504, 505 fn. 6 (1999). The laughter by Lawless did not mitigate the inherent coerciveness of the remark. *Meisner Electric*, 316 NLRB 597, 599 (1995).

2. The job application rejection

The General Counsel has the burden of proving that protected activity was at least a partial motivating factor in the Employer's adverse employment decision. Having done so, the burden then shifts to the Respondent to show that lawful reasons necessarily would have caused that decision. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). It is not enough to demonstrate that a lawful reason may have existed. It must be proven that the lawful motivation actually motivated the adverse action. *Pace Industries*, 320 NLRB 661-662, 709 (1996), enf'd. 118 F.3d 585 (8th Cir. 1997).

A prima facie case is made out when the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement that has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be war-

ranted under all the circumstances of a case, even without direct evidence. *FPC Moldings, Inc.*, 64 F.3d 935, 942 (4th Cir. 1995), enf'g. 314 NLRB 1169 (1994) (citations omitted). Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enf'd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Association Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *Clinton Food 4 Less*, 288 NLRB 597-598 (1988). *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 470 (9th Cir. 1966); *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988); *Rain Ware, Inc.*, 735 F.2d 1349, 1354 (7th Cir. 1984); *Williams Contracting, Inc.*, 309 NLRB 433 (1992); and *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

The General Counsel has adduced evidence of knowledge, animus, and I find, false and pretextuous reasons why the Respondent did not accept Powell's employment application, i.e., inadequately investigated assumptions of Powell's attitude toward interstate travel and compensation reduction.

The record as a whole supports an inference that Lopinot initially agreed to hire Powell but, after consultation with the Respondent's managers who had been UPS managers and/or UPS supervisors during Powell's militancy regarding union insignia at UPS, changed his mind because of some factor other than his proffered reasons, which can only be those prior UPS and subsequent union activities. Lopinot himself failed to deny that accusation made to him by Powell but rather, giving no reasons at all, said that he would check further, i.e., check with his supervisors. The inference is further enhanced by Lopinot's referencing Powell to UPS former managers in the context of Lawless' pointed warning regarding union insignia, i.e., the core of Powell's UPS union militancy. I therefore conclude that the General Counsel has sustained his *Wright Line* burden. I further conclude that the Respondent has failed to show that Powell's application for employment would have necessarily been rejected regardless of his past union activities. I therefore find that the Respondent violated Section 8(a)(1) and (3) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. As found above, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. As found above, the Respondent has violated Section 8(a)(1) and (3) of the Act and, further, I find such violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act. Having found that the Respondent unlawfully refused to hire James S. Powell Jr. as an over-the-road truckdriver, I recommend that the Respondent be ordered to offer him employment in that position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges he might have enjoyed, and make him whole for any loss of earnings and other benefits computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any net earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus

interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Hogan Transports, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire James S. Powell Jr. because of past membership in, support of, or activities on behalf of the Teamsters Union.

(b) Instructing job applicants to abandon their sympathies, support, or activities on behalf of the Teamsters Union as a condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer James S. Powell Jr. full-time employment as an over-the-road truckdriver at its St. Louis, Missouri terminal or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges that he might have enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(c) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 28, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."